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In The

Supreme Court of the United States

October Term, 1996

CITY OF ALBUQUERQUE,

Petitioner,

versus

CAROL M. BROWNER, OR HER SUCCESSOR AS ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the United States Environmental Protection Agency approve and enforce Indian Pueblo Water Quality Standards beyond Pueblo Boundaries when those standards have no scientific or rational basis?

2. Is United States Environmental Protection Agency action which forces the City of Albuquerque to spend taxpayer money to protect Indian Pueblo religious uses of river water allowable under the establishment clause?

3. Does the United States Environmental Protection Agency's unreasonable consequences resolution process comply with the Clean Water Act Mandate when it is not binding and denies standing to affected parties?

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OPINIONS BELOW

The October 7, 1996 Opinion of the United States Court of Appeals for the Tenth Circuit affirming the United States District Court for the District of New Mexico is reported at 97 F.3d 415 and is reprinted in Appendix A.

The October 21, 1993 Opinion of the United States District Court for the District of New Mexico is reported at 865 F.Supp. 733 and is reprinted in Appendix B.

The January 7, 1997 Tenth Circuit Court of Appeals Order denying the City of Albuquerque's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in Appendix C.

JURISDICTION

This petition seeks review of the October 7, 1996 Opinion of the United States Court of Appeals for the Tenth Circuit. The City of Albuquerque's timely-filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on January 7, 1997. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing. The Supreme Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution states in relevant part:

Amendment I:

> Congress shall make no law respecting an establishment of religion . . .

5 U.S.C. § 706 states in relevant part:

§ 706. Scope of review

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> . . .

33 U.S.C. § 1313(c), due to its length, is set forth in Appendix D.

33 U.S.C. § 1341(a)(2) states in relevant part:

> § 1341. Certification
>
> (a) Compliance with applicable requirements; application procedures; license suspension
>
> . . .
>
> (2) . . . Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be

necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

33 U.S.C. § 1370 states:

> Except as expressly provided in this Act, nothing in this act shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this Act, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this Act; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1377(e) states in relevant part:

(e) Treatment as States

> The Administrator is authorized to treat an Indian tribe as a State for purposes of

> subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section. . . . Not later than 18 months after February 4, 1987, the Administrator shall, in consultation with Indian tribes, promulgate final regulations which specify how Indian tribes shall be treated as States for purposes of this chapter. The Administrator shall, in promulgating such regulations, consult affected States sharing common water bodies and provide a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by States and Indian tribes located on common bodies of water. Such mechanism shall provide for explicit consideration of relevant factors including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts, and present and historical uses and quality of the waters subject to such standards. Such mechanism should provide for the avoidance of such unreasonable consequences in a manner consistent with the objective of this chapter.

40 C.F.R. § 131.11(a)(1) states in relevant part:

> (1) States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.

40 C.F.R. § 131.7, due to its length, is set forth in Appendix E.

STATEMENT OF THE CASE

For the first time, in 1987, Congress authorized the United States Environmental Protection Agency (EPA) to treat the 435 congressionally recognized Indian tribes as states for certain purposes under the Clean Water Act ("CWA"), 33 U.S.C. § 1377. The Isleta Pueblo ("Isleta") was the first tribe to apply for and receive "state" status under this program. On December 24, 1992 EPA approved the Isleta's Water Quality Standards. Record in the Tenth Circuit, Aplt. App. 966-68. The Isleta Standards are found at Aplt. App. 1240-66.

The City of Albuquerque ("the City") filed suit in the U.S. District Court attacking both the EPA approval of the Isleta's Standards and the EPA regulations (40 C.F.R. § 131.7) implementing the legislative mandate that EPA resolve unreasonable consequences resulting from tribal standards. The District Court had jurisdiction under the Declaratory Judgment Act (28 U.S.C. §§ 2201-2202), Federal Question jurisdiction (28 U.S.C. § 1331), and the Administrative Procedures Act ("APA") (5 U.S.C. §§ 500 *et seq.*).

The District Court granted Summary Judgment against the City and the Tenth Circuit Court of Appeals affirmed.

The City challenged the EPA approval of the Pueblo Water Quality Standards as not supported by a rational or

scientific basis in the record. In ruling against the City, the Tenth Circuit stated:

> If the proposed standards are more stringent than necessary to comply with the Clean Water Act's requirements, the EPA may approve the standards without reviewing the scientific support for the standards. Appendix to this Petition, App. 24.

The City contends that this holding conflicts with the Administrative Procedures Act prohibition against arbitrary and capricious agency action, 5 U.S.C. § 706(2)(A), as well as EPA's own regulation requiring state standards to be scientifically supported. 40 C.F.R. § 131.11.

The Tenth Circuit also held that Indian Tribes through their inherent sovereign power could adopt water quality standards which are more stringent than federal standards and then, that EPA could enforce these standards against parties, such as the City of Albuquerque, who were located outside of tribal boundaries. App. 12-18. This holding conflicts with U.S. Supreme Court decisions which limit the exercise of Indian tribe inherent sovereign power to within tribal boundaries.

EPA approved the Pueblo's water quality standard for "primary contact ceremonial use." That term is defined:

> Primary contact ceremonial use means *the use of a stream, reach, lake, or impoundment for religious or traditional purposes by members of the Pueblo of Isleta;* such use involves immersion and intentional or incidental ingestion of water. [emphasis supplied]

Aplt. App. 1254.

On its face, this standard is adopted to protect the Isleta Pueblo's religious activities. The City contends that EPA approval of this standard which promotes the Pueblo religion and which the Tenth Circuit holds, is enforceable against the City as an upstream discharger (App. 17-18) violates the Establishment Clause of the First Amendment.

33 U.S.C. § 1377(e) requires EPA to adopt regulations to resolve "any unreasonable consequences that may arise as a result of differing" state and Indian tribe standards. The City contends that EPA's non-binding mediation regulations, 40 C.F.R. § 131.7, are not sufficient to meet that mandate.

33 U.S.C. § 1377(e) requires EPA to provide explicit consideration of "the effects of differing water quality permit requirements on" upstream dischargers and of the "economic impacts" of those requirements. The EPA regulations, 40 C.F.R. § 131.7, however, fail to give economically impacted upstream dischargers standing to institute the dispute resolution process. The City contends that the EPA regulations do not meet the statutory mandate.

REASONS FOR GRANTING THE WRIT

Standard of Review

Both EPA's December 24, 1992 approval of the Isleta Standards and EPA's December 12, 1991 adoption of the "Dispute Resolution Mechanism" regulation are agency actions reviewable under 5 U.S.C. § 706(2)(A)-(D) of the Administrative Procedures Act (APA). *American Mining*

Congress, 772 F.2d 617, 625 (10th Cir. 1985), *cert. denied*, 476 U.S. 1158 (1986). *Sierra Club v. EPA*, 540 F.2d 1114, 1123 (D.C. Cir. 1976). *Environmental Defense Fund v. Costle*, 657 F.2d 275, 282-3 (D.C. Cir. 1981).

That law states in relevant part:

> . . . The reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law . . .
>
> 5 U.S.C. § 706(2)

I. EPA CANNOT APPROVE AND ENFORCE INDIAN PUEBLO WATER QUALITY STANDARDS BEYOND TRIBAL BOUNDARIES WHEN THOSE STANDARDS ARE NOT SUPPORTED BY A SCIENTIFIC OR RATIONAL BASIS.

A. The Pueblo Standards must have a scientific or rational basis.

The Tenth Circuit's opinion conflicts with the Administrative Procedure Act, with the Supreme Court's Opinions and with EPA's own regulations, all of which prohibit arbitrary and capricious agency action.

The Tenth Circuit Court of Appeals states in its opinion:

> If the proposed standards are more stringent than necessary to comply with the Clean Water Act requirements, the *EPA may approve the standards without reviewing the scientific support for the standards.*

App. 24. [emphasis supplied]

In applying the arbitrary and capricious standard, the Supreme Court has emphasized the need for administrative agencies to examine the relevant data and to articulate a rational connection between the facts found and the agency decision:

> . . . the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found the choice made.' *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962). In reviewing that explanation, we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra,* at 285; *Citizens to Preserve Overton Park v. Volpe, supra,* at 416. Normally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing

> court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Motor Vehicle Mfrs. Assn. v. State Farm Mut., 463 U.S. 29, 42-44 (1983).

Consistent with the Supreme Court's decisions, EPA's own regulations require that state water quality standards "be based on sound, scientific rationale." 40 C.F.R. § 131.11(a)(1). Administrative agencies are required to follow their own regulations, *Bar MK Ranches v. Yvetter*, 994 F.2d 734, 738 (10th Cir. 1993). See also *Natural Resources Defense Council v. United States Environmental Protection Agency*, 16 F.3d 1395, 1401 (4th Cir. 1993).

The Tenth Circuit's holding that "EPA may approve the standards without reviewing the scientific support for the standards," App. 24, directly conflicts with the Supreme Court decisions and EPA's own regulation.

Even if the Clean Water Act, allows tribes and pueblos to adopt standards which are more stringent than the federal standards, such standards, must still be supported by a scientific or rational basis before EPA approves them. Otherwise, EPA approval is arbitrary and capricious.

In applying the arbitrary and capricious standard to agency actions, the Tenth Circuit itself has stated:

> The key question during judicial review is whether the agency action is reasonable and supported by the record before the court. . . . The controlling test is whether the record facts

> supporting agency action are adequately adduced and rationally applied.

Colorado Healthcare Association v. Colorado Department of Social Services, 842 F.2d 1158, 1164 (10th Cir. 1988).

If Congress intended EPA to rubberstamp all tribal standards which were more stringent than federal standards, the Clean Water Act would have simply stated that such standards were automatically approved. Stringency alone, however, is not a substitute for a rational basis. Even if the tribes are allowed to adopt standards more stringent than federal standards, common sense and the overwhelming weight of the law mandates that the EPA approval must be supported by a scientific or rational basis. As the Tenth Circuit's opinion acknowledges, EPA's own regulations provide:

> States can draw upon EPA's recommended water quality criteria or use other criteria *for which they have sound scientific support*. See 40 C.F.R. § 131.11 (1995) [emphasis supplied]

App. 6, note 5.

Nevertheless, the Opinion states:

> If the proposed standards are more stringent than necessary to comply with the Clean Water Act requirements, the *EPA may approve the standards without reviewing the scientific support for the standards.*

App. 24. [emphasis supplied]

The opinion's departure from the established principles of administrative law, and the contradiction with EPA's regulations, call for granting the writ.

B. The Pueblo Standards should not be enforced beyond Pueblo boundaries.

The City has argued that 33 U.S.C. § 1370 (which allows states to adopt standards more stringent than EPA's) is not incorporated in 33 U.S.C. § 1377(e) (the section that specifically enumerates the powers that Indian tribes may exercise under the Clean Water Act). The Tenth Circuit opinion agrees with that assertion, App. 16. Nevertheless, the Tenth Circuit found that Indian tribes may adopt standards more stringent than federal standards under their inherent sovereign power, App. 16-17. That proposition might be true on its face, but the Tenth Circuit goes on to conclude that EPA may enforce the tribal standards off reservation, App. 17-18. This conflicts with the holdings of the United States Supreme Court that the exercise of inherent sovereign power is limited to within tribal boundaries. *Montana v. U.S.*, 450 U.S. 544, 562-66 (1980), *U.S. v. Wheeler*, 435 U.S. 313, 323 (1978), *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973), *Duro v. Reina*, 495 U.S. 676, 686 (1990).

EPA should not be allowed to use other provisions of the Clean Water Act to circumvent the exclusion of 33 U.S.C. § 1370 from the Indian tribe program. Since the Clean Water Act specifically excludes 33 U.S.C. § 1370, Tribal Standards which are more stringent than federal standards should not be applied outside of the tribal boundaries. The writ should be granted.

II. EPA APPROVAL OF THE ISLETA PUEBLO CEREMONIAL AND RELIGIOUS USE STANDARD VIOLATES THE ESTABLISHMENT CLAUSE.

The First Amendment of the United States Constitution provides, in pertinent part, that "Congress shall make no law respecting an establishment of religion. . . . "

This clause guards against community division by religious belief through prohibiting governmental action which directly supports or inhibits particular religious beliefs. *Engel v. Vitale*, 370 U.S. 421 (1962). Forbidden action includes sponsorship, financial support, and active involvement of the sovereign in religious activity. *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970).

The United States Supreme Court has held that government action will violate the Establishment Clause if it fails to satisfy any one part of a three-pronged test. *Stone v. Graham*, 449 U.S. 39, 41 (1980). Under the first prong, the law in question must reflect a clearly secular purpose. *Epperson v. Arkansas*, 393 U.S. 97 (1968). Second, the law must have a primary effect that neither advances nor inhibits religion. *Board of Education v. Allen*, 392 U.S. 236, 243 (1968). And third, the law must avoid excessive governmental entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). EPA approval of the Isleta Pueblo's "Primary Contact Ceremonial Use Standard" violates all three prongs of the test.

EPA approved the Pueblo's "Primary Contact Ceremonial Use" Standard for that portion of the Rio Grande within the boundaries of the Pueblo. The term "Primary Contact Ceremonial Use" is defined by the Pueblo Standards as follows:

> Primary Contact Ceremonial Use means the use of a stream, reach, lake, or impoundment *for religious or traditional purposes* by members of the PUEBLO OF ISLETA; such use involves immersion and intentional or incidental ingestion of water.

Aplt. App. 1254. [emphasis supplied]

The Pueblo standard, on its face, plainly indicates that it is adopted in furtherance of religious activities. The Pueblo's Amicus brief in the Tenth Circuit confirms the secret religious ceremonial use of the water by the Pueblo:

> The flowing waters of the Rio Grande have been since ancient times, and are now, central to the life of the Isleta people. That communion with these waters would be the major part of the religion and ceremonies of the Isleta people hardly requires contemplation. The Isleta people are reticent about the water and how it is used because privacy is essential for the efficacy of the ceremony, but they have made known that ceremonies can involve the incidental or intentional ingestion of water.

Pueblo Tenth Circuit Amicus brief at 3. See also Pueblo brief in U.S. District Court, Aplt. App. 400-403.

The Pueblo does not use the river water for the community drinking water system (Aplt. App. 925), and there is no evidence in the record of non-religious intentional ingestion of the untreated Rio Grande water. The Pueblo confirms in its Amicus brief in the U.S. District Court that the reason for the Primary Contact Ceremonial Use designation, and its protection of water for intentional ingestion is to promote religious practices and

ceremonies within the Pueblo. Aplt. App. 400-403. There is simply no other purpose to this standard other than the protection of religious uses of water.

The reason for the designated use is explicitly sectarian. The Ceremonial Use therefore fails the first prong of the test.

To pass the second prong, the challenged action must have a primary effect which neither inhibits nor advances religion. The Pueblo confirms that its Ceremonial Use standard was adopted explicitly to advance tribal religion. Aplt. App. 400-03. EPA approval of the standard, therefore, also fails the second prong.

The last test is whether the challenged action results in excessive governmental entanglement with religion. The CWA (33 U.S.C. § 1313(c)) mandates a review every three years to determine whether State and Indian tribe water quality standards adequately protect designated uses. This will force the Pueblo and EPA to inquire, on an ongoing basis, whether the standards adequately protect religious uses of the river water. To know whether the Standards are adequately protective, EPA must inquire how the water is being used. Such inquiry would be particularly intrusive for the Pueblo religion, the beliefs and practices of which are not freely disclosed. Aplt. App. 402, 1018-19, 1232. Any increased protection for religious use in the standards would both advance religion and trap EPA in precisely the type of excessive entanglement with religion which is proscribed by the Establishment Clause. Additional entanglement results from the Tenth Circuit's holding that "EPA has the authority to require upstream NPDES dischargers such as

Albuquerque to comply with downstream tribal standards." App. 18. EPA approval of the Ceremonial Use standard fails the third prong of the test.

The government may not coerce anyone into supporting religion. *Lee v. Weisman*, 505 U.S. 577 (1992). The EPA, however, is placing the City of Albuquerque and its citizens in a position where they may well be required to spend hundreds of millions of dollars for waste water treatment solely to support Pueblo religion.[1] The Ceremonial Use standard fails not just one of the three prongs; it fails *all* of them.

Additionally, the Tenth Circuit Opinion is self contradictory on this point. It states:

> The EPA's approval of the primary contact ceremonial use designation serves a clear secular purpose: promotion of the goals of the Clean Water Act.

App. 29.

The Opinion goes on to say that EPA is not advancing or promoting the Isleta Pueblo's religion, App. 30.

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[1] The Tenth Circuit Opinion states: "Under §§ 1311, 1341, 1342 and 1377, the EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards." App. 18. Uncontradicted evidence in the record establishes a capital cost to Albuquerque taxpayers of $248 million and annual operating cost of $26 million for the reverse osmosis treatment necessary to attempt to meet many of the Pueblo Standards, including the religious use intentional human ingestion standard. Aplt. App. 665, 686, 688, 691, 740, 741.

Then to the contrary the opinion states:

> If anything, the *agency's approval furthers the free exercise of religion.* [emphasis supplied]

App. 30, note 20. See also *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988) and *Badoni v. Higgenson*, 638 F.2d 172 (10th Cir. 1980), both discussing the interaction between tribal religions practices and the First Amendment.

The Opinion's statement that approval of the "ceremonial use designation serves a clear secular purpose" contradicts the statement that "the agency's approval furthers the free exercise of religion." The Tenth Circuit's ruling on the Establishment Clause issue conflicts with the Supreme Court Establishment Clause opinions cited above and with itself. The writ should be granted.

III. THE EPA DISPUTE RESOLUTION REGULATION DOES NOT MEET THE CWA MANDATE.

A. The EPA dispute resolution regulation fails to meet the statutory mandate that unreasonable consequences be resolved.

The CWA, 33 U.S.C. § 1377(e), states in pertinent part:

> The administrator *shall*, in promulgating such regulations . . . *provide a mechanism for the resolution of any unreasonable consequences* that may arise as a result of differing water quality standards that may be set by states and Indian tribes located on common bodies of water. . . . Such *mechanism should provide for the avoidance of such unreasonable consequences* . . . [emphasis supplied]

Despite the clear mandate for an effective dispute resolution mechanism, the Tenth Circuit Opinion sanctions EPA's voluntary mediation approach:

> The EPA's decision to use mediation and non-binding arbitration is consistent with the Clean Water Act requirement that the EPA encourage cooperative activities by the states.

App. 27.

The Tenth Circuit Opinion went on to find that:

> The EPA's establishment of a dispute resolution mechanism that relies on tribal and state cooperation to address unreasonable consequences was a reasonable interpretation of § 1377(e) that is entitled to deference.

App. 28.

The toothless voluntary non-binding process established by EPA's regulations does not meet the requirement that the EPA shall "provide a mechanism for the *resolution of any unreasonable consequences.*" 33 U.S.C. § 1377(e) [emphasis supplied] If either the state or the tribe fails to initiate the dispute resolution mechanism, as occurred in this case, or if either fails to agree on a mediated settlement, as often happens in non-binding mediation, the unreasonable consequence will remain. This is contrary to the statutory mandate of the Clean Water Act, 33 U.S.C. § 1377(e) and the Administrative Procedures Act, 5 U.S.C. § 706(2)(A) and (C), and the Court should grant the writ.

B. EPA'S dispute resolution mechanism fails to protect the interests of upstream dischargers as mandated by the Clean Water Act.

In mandating the mechanism for resolution of unreasonable consequences, 33 U.S.C. § 1377(e) states in pertinent part:

> Such mechanism shall provide for *explicit consideration of relevant factors, including, but not limited to, the effects of differing water quality permit requirements on upstream and downstream dischargers, economic impacts,* and present and historical uses and quality of the water subject to standards. Such mechanism should provide for the avoidance of such unreasonable consequences. . . . [emphasis supplied]

The Tenth Circuit recognizes that the City of Albuquerque is an upstream discharger whose National Pollution Discharge Elimination System (NPDES) permit is directly subject to the Isleta Standards. App. 6. In *Sierra Club v. EPA*, 995 F.2d 1478 (9th Cir. 1993), the Ninth Circuit held that a city has a "protectable" interest in its NPDES discharge permit, and has the right to intervene in proceedings which might affect the terms of that permit. Nevertheless, the Tenth Circuit Opinion states:

> It is reasonable, therefore, to allow only those two sovereigns [the state and the tribe] to initiate the dispute resolution process to resolve their differences rather than to include affected permittees such as Albuquerque.

App. 28. [bracketed material supplied] See also 40 C.F.R. § 131.7(C) which provides only States and Indian Tribes standing to instigate the dispute resolution process.

Neither a permittee with a protectable interest in its permit, nor EPA, the agency responsible for ensuring compliance with the CWA, may invoke the dispute resolution process. Therefore, the factors which the CWA explicitly mandates for consideration may well never be considered and the parties who suffer the unreasonable consequences may never be heard. An upstream discharger or permittee may participate only at the discretion of the EPA, 40 C.F.R. § 131.7(g)(2), and then only if a tribe or state has initiated the process.

Neither the State of New Mexico nor the Isleta Pueblo initiated the dispute resolution process in this case. The unreasonable Isleta Standards are still in place. For example, the Isleta Arsenic Standard for the Rio Grande is 17 parts per *trillion*, nearly one thousand times more stringent than the EPA approved New Mexico State Standard of 20 parts per *billion*. Aplt. App. 659-60. The water in the Rio Grande upstream from the City's discharge contains 24 parts per *billion*, Aplt. App. 662, and the well water used for Albuquerque's drinking water supply averages 17 parts per *billion* of arsenic. Aplt. App. 679.

EPA had included nondetectible limit arsenic requirements in the City's permit (Draft Three) as a result of the Pueblo's arsenic standard. Aplt. App. 658-60. The Isleta Standard is still in place and the City has no assurance that EPA will not impose the zero detectible Arsenic standard when the present permit expires in 1998. Compliance with the nondetectible discharge limit would require reverse osmosis treatment (Aplt. App. 659-61) at a cost to the City of approximately $248 million in capital improvements (Aplt. App. 686) and $26 million per year

in operating costs. Aplt. App. 688, 741. Even if the City achieves zero detectible discharge, the Isleta Arsenic standard will not be met in the Rio Grande water within the Pueblo because of natural and other factors affecting the river. Aplt. App. 662. The 17 parts per *trillion* Arsenic standard remains unattainable, totally irrational and poised to place excessive economic burdens on the City. The unreasonable consequences of the Isleta Standards have not been resolved.

Parties subject to unreasonable consequences must have standing to instigate the unreasonable consequences resolution process required by the CWA. The writ should be granted.

CONCLUSION

For the foregoing reasons, a writ or certiorari should issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

CITY OF ALBUQUERQUE, Plaintiff-Appellant, v. CAROL BROWNER, or her successor as Administrator, United States Environmental Protection Agency, Defendant-Appellee, THE WESTERN COALITION OF ARID STATES; METROPOLITAN SEWERAGE AGENCIES; NEW MEXICO MUNICIPAL LEAGUE, INC.; NEW MEXICO ENVIRONMENT DEPARTMENT; STATE OF NEW MEXICO; and PUEBLO OF ISLETA, Amici Curiae.	)	No. 93-2315

APPEAL FROM THE UNITED
STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CIV-93-82-M)

(Filed Oct. 7, 1996)

Bruce S. Garber of Garber and Hallmark, P.C., Santa Fe, New Mexico (Cullen Hallmark of Garber and Hallmark, P.C., Santa Fe, New Mexico; Robert M. White, City Attorney; and Gregory P. Smith, Assistant City Attorney, City of Albuquerque, Albuquerque, New Mexico, with him on the briefs), for Plaintiff-Appellant.

Elizabeth A. Peterson, Attorney, Department of Justice, Washington, DC (Lois J. Schiffer, Assistant Attorney General, Department of Justice, Washington, DC; John J. Kelly, United States Attorney, and John W. Zavitz, Assistant United States Attorney, District of New Mexico, Albuquerque, New Mexico; Elizabeth M. Ahern and David C. Shilton, Attorneys, Department of Justice, Washington, DC; Randolph L. Hill, U.S. Environmental Protection Agency, Office of the General Counsel, Washington, DC, and Pat Rankin, U.S. Environmental Protection Agency, Office of Regional Counsel, Dallas, Texas, of Counsel), with her, on the brief for Defendant-Appellee.

(Jerome C. Muys of Will & Muys, P.C., Washington, DC, on the brief, for amicus curiae Western Coalition of Arid States.)

(Lee C. White, Washington, D, on the brief, for amicus curiae Metropolitan Sewerage Agencies.)

(Steven Barshov of Sive, Paget & Riesel, P.C., New York, New York; Richard L.C. Virtue and Stephany S. Wilson of Taichert, Wiggins, Virtue, Wilson & Najjar, Santa Fe, New Mexico, on the brief, for amicus curiae New Mexico Municipal League.)

(Tom Udall, Attorney General of New Mexico; Alletta Belin, Assistant Attorney General; and Tracy M. Hughes, Special Assistant Attorney General, New Mexico Environment Department, Santa Fe, New Mexico, on the brief, for amicus curiae New Mexico Environment Department and State of New Mexico.)

(L. Lamar Parrish of Ussery & Parrish, P.A., Albuquerque, New Mexico, on the brief, for amicus curiae Pueblo of Isleta.)

Before HENRY and McKAY, Circuit Judges, and JENKINS,* Senior District Judge.

McKAY, Circuit Judge.

The City of Albuquerque [Albuquerque] filed a complaint challenging the U.S. Environmental Protection Agency's [EPA] approval of the Pueblo of Isleta's [Isleta Pueblo] water quality standards on numerous grounds. After denying Albuquerque a temporary restraining order and a preliminary injunction, the district court denied its motion for summary judgment while granting

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* The Honorable Bruce S. Jenkins, Senior United States District Judge for the District of Utah, sitting by designation.

the Defendant EPA's motion for summary judgment. *City of Albuquerque v. Browner*, 865 F. Supp. 733 (D. N.M. 1993). Albuquerque now appeals the district court's judgment.

I. Background

In 1987, Congress amended the Clean Water Act to authorize the Defendant EPA to treat Indian tribes as states under certain circumstances for purposes of the Clean Water Act.[1] Through the amendment Congress merged two of the four critical elements necessary for tribal sovereignty – water rights and government jurisdiction[2] – by granting tribes jurisdiction to regulate their water resources in the same manner as states.[3] Congress's authorization for the EPA to treat Indian tribes as states preserves the right of tribes to govern their water resources within the comprehensive statutory framework of the Clean Water Act. This case involves the first

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[1] Clean Water Act, Pub. L. No. 92-500, 86 Stat. 896 (Oct. 18, 1972), as amended by Act of Feb. 4, 1987, Pub. L. No. 100-4, tit. V, § 506, 101 Stat. 76 (codified at 33 U.S.C. §§ 1251-1387).

[2] The other two critical elements to tribal sovereignty are land and mineral rights.

[3] *See* Amicus Curiae Br. of the New Mexico Municipal League in Support of Appellant City of Albuquerque, Ex. B at CRS-8, CRS-11 (Memo from Library of Congress, Congressional Research Service, American Law Division, to Senate Select Committee on Indian Affairs, regarding the Extent of Tribal Jurisdiction under Section 518 of the Clean Water Act (Feb. 21, 1991)).

challenge to water quality standards adopted by an Indian tribe under the Clean Water Act amendment.[4]

The Rio Grande River flows south through New Mexico before turning southeast to form the border between Texas and Mexico. Plaintiff City of Albuquerque operates a waste treatment facility which dumps into the river approximately five miles north of the Isleta Pueblo Indian Reservation. The EPA recognized Isleta Pueblo as a state for purposes of the Clean Water Act on October 12, 1992.

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[4] The Clean Water Act provides two measures of water quality. One measure is an "effluent limitations guideline." Effluent limitations guidelines are uniform, technology-based standards promulgated by the EPA, which restrict the quantities, rates and concentrations of specified substances discharged from point sources. *See* 33 U.S.C. §§ 1311, 1314. The other measure of water quality is a "water quality standard." Unlike the technology-based effluent limitations guidelines, water quality standards are not based on pollution control technologies, but express the desired condition or use of a particular waterway. Water quality standards supplement technology-based effluent limitations guidelines "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). In this case, the water quality standards of the Isleta Pueblo are at issue.

There are three elements of water quality standards under the Clean Water Act: (1) one or more designated "uses" of each waterway (e.g., public water supply, recreation, or agriculture) consistent with the goals of the Act as articulated in 33 U.S.C. § 1251; (2) "criteria" expressed in numerical concentration levels or narrative statements specifying the amount of various pollutants that may be present in the water and still protect the designate uses; and (3) an anti-degradation provision. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131 (1995).

The Isleta Pueblo adopted water quality standards for Rio Grande water flowing through the tribal reservation, which were approved by the EPA on December 24, 1992.[5] The Isleta Pueblo's water quality standards are more stringent than the State of New Mexico's standards.

The Albuquerque waste treatment facility discharges into the Rio Grande under a National Pollution Discharge Elimination System [NPDES] permit issued by the EPA. The EPA sets permit discharge limits for waste treatment facilities so they meet state water quality standards. Albuquerque filed this action as the EPA was in the process of revising Albuquerque's NPDES permit to meet the Isleta Pueblo's water quality standards.

In its complaint, Albuquerque challenged the EPA's approval of Isleta Pueblo's water quality standards on

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[5] The EPA provides states with substantial guidance in drafting water quality standards. States must adopt criteria that protect the designated uses. 40 C.F.R. § 131.11 (1995). The Clean Water Act requires the EPA to develop criteria for water quality that reflect the latest scientific knowledge, and to provide those criteria to the states as guidance. 33 U.S.C. § 1314(a). States can draw upon the EPA's recommended water quality criteria or use other criteria for which they have sound scientific support. *See* 40 C.F.R. § 131.11 (1995).

Prior to adopting or revising any water quality standard, the state must provide notice and an opportunity for a public hearing. 40 C.F.R. § 131.10(e) (1995). The criteria may be based on EPA guidance, EPA guidance modified to reflect conditions at the site, or on other scientifically defensible methods. *Id.* After adoption, the states must submit the water quality standards to the EPA for review and approval. 33 U.S.C. § 1313(c)(2). The EPA reviews the state's water quality standards to ensure that they are consistent with the Act's requirements. *Id.* at § 1313(c)(3).

numerous grounds.[6] The district court denied Albuquerque's request for a temporary restraining order and a preliminary injunction. Then, the district court denied Plaintiff's motion for summary judgment while granting the Defendant EPA's motion for summary judgment.

Albuquerque now appeals the district court's judgment. On April 15, 1994, Albuquerque, the EPA, the State of New Mexico, and Isleta Pueblo agreed to a new four-year NPDES permit for Albuquerque pursuant to a stipulation and agreement. The stipulation and agreement does not mention the claims in this suit, and the EPA's regulations and the Isleta Pueblo's revised water quality standards are in effect. During the briefing stage of this appeal, Albuquerque filed a motion requesting an order vacating the district court's judgment due to mootness and remand with instructions to dismiss its complaint without prejudice.

Albuquerque has raised seven issues on appeal: (1) whether the district court's opinion and order should be vacated because the case is mooted by an agreement negotiated by the parties; (2) whether the EPA reasonably interpreted § 1377 of the Clean Water Act as providing the Isleta Pueblo's authority to adopt water quality standards that are more stringent than required by the statute, and whether the Isleta Pueblo standards can be applied by the EPA to upstream permit users; (3) whether the EPA complied with the Administrative Procedure Act's notice and comment requirements in approving the

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[6] Albuquerque's suit names only the EPA as a defendant. The Isleta Pueblo is amicus curiae in support of the EPA in the suit.

Isleta Pueblo's standards under the Clean Water Act; (4) whether the EPA's approval of the Isleta Pueblo's standards was supported by a rational basis; (5) whether the EPA's adoption of regulations providing for mediation or arbitration to resolve disputes over unreasonable consequences of a tribe's water quality standards is a reasonable interpretation of § 1377(e) of the Clean Water Act; (6) whether the EPA's approval of the Isleta Pueblo's ceremonial use designation offends the Establishment Clause of the First Amendment; and (7) whether the Isleta Pueblo's standards approved by the EPA are so vague as to deprive Albuquerque of due process.

Summary judgment is proper if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Albuquerque's challenge of the EPA's decision is not premised on disputed facts; rather, it asserts that the EPA was not entitled to judgment as a matter of law. We review the district court's summary judgment de novo, using the standards that were applicable in the district court. *Pueblo of Sandia v. United States*, 50 F.3d 856, 859 (10th Cir. 1995); *Lewis v. Babbitt*, 998 F.2d 880, 881 (10th Cir. 1993).

II. Mootness

As a preliminary issue, Albuquerque has filed a motion to vacate the district court's opinion and order and to remand this action to the district court with instructions to dismiss their complaint without prejudice. As a basis for this motion, Albuquerque asserts that the

case is mooted by a negotiated agreement whereby Albuquerque, the EPA, the State of New Mexico, and the Isleta Pueblo have each agreed to a new four-year NPDES permit for the Albuquerque waste facility. Thus, Albuquerque asserts that under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), we should vacate the judgment and dismiss the complaint without prejudice.

We deny Albuquerque's motion because the case is not moot. "The burden of demonstrating mootness 'is a heavy one.' " *Los Angeles County v. Davis*, 440 U.S. 625, 631 (1979) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953)). Under the mootness doctrine, " 'a case is moot when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome.' " *Davis*, 440 U.S. at 631 (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)). The settlement agreement, which fails to even mention this case, does not resolve this suit. Under the settlement, the EPA has not withdrawn its approval of the Isleta Pueblo standards or changed its regulations. A "live" controversy still exists here because the parties still disagree about whether the EPA's approval of the Isleta Pueblo standards is lawful under the Clean Water Act and the U.S. Constitution and whether the EPA's regulations are consistent with the Act.

Parties lack a legally cognizable interest in the outcome of a case if "(1) it can be said with assurance that 'there is no reasonable expectation . . . ' that the alleged violation will recur, . . . and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Davis*, 440 U.S. at 631 (citations omitted). The parties in this case have retained a legally

cognizable interest because the Isleta Pueblo water quality standards and the EPA's regulations challenged in Albuquerque's suit are still in force. The stipulation and agreement settled issues concerning only the EPA's issuance of Albuquerque's NPDES permit. In this case, Albuquerque is challenging the EPA's regulations and the Agency's approval of water quality standards under the Clean Water Act, not the issuance of an NPDES permit.[7] Under the circumstances, there is no reasonable expectation that the alleged violation will not recur, and the settlement agreement has not completely and irrevocably eradicated the effects of the alleged violation. *See FDIC v. Jennings*, 816 F.2d 1488, 1491 (10th Cir. 1987) (settlement that does not resolve all issues does not moot action). Thus, this action is not mooted because the stipulation and agreement is not a final settlement of all claims brought in the City's suit.

Even if this action were moot, we would not grant vacatur because Plaintiff's motion appears to be merely an attempt to expunge the district court's adverse decision, giving the City the option to relitigate this action at some later date. The Supreme Court recently explained that mootness by reason of settlement does not justify vacatur of a federal civil judgment under review absent

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[7] The approval of water quality standards and the issuance of an NPDES permit are two different administrative actions. The issuance of an NPDES permit under the Clean Water Act is subject to direct review by the court of appeals. 33 U.S.C. § 1369(b)(1)(F). The approval of water quality standards is initially reviewed by the district courts under the Administrative Procedure Act. *See, e.g., Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976).

exceptional, equitable circumstances. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392, 393 (1994). In some cases where a case becomes moot on appeal through happenstance, it is proper for the appellate court to vacate the judgment of the district court. *Munsingwear*, 340 U.S. at 39. Happenstance does not include cases resolved by actions attributable to the parties, such as a negotiated settlement. *U.S. Bancorp Mortgage*, 115 S. Ct. at 391-92; *Oklahoma Radio Assocs. v. FDIC*, 3 F.3d 1436, 1439 (10th Cir. 1993). The mootness alleged by Albuquerque is not happenstance; rather, it results from the Plaintiff's voluntary settlement of issues related to the EPA's issuance of the NPDES permit.

Also, we will not apply the *Munsingwear* rule where "the losing party, fearful of having its loss confirmed by the appellate court, abandons the appeal and then moves to have the trial court's judgment vacated as moot, thus 'retiring to lick its wounds, fully intending to come out fighting again.' " *Harris v. Board of Governors of the Federal Reserve Sys.*, 938 F.2d 720, 724 (7th Cir. 1991) (quoting *Commodity Futures Trading Comm'n v. Board of Trade*, 701 F.2d 653, 656 (7th Cir. 1983)). Albuquerque was not required to pursue this appeal. If Plaintiff desired to end this case in good faith, it could have filed at any time a motion for voluntary dismissal. Plaintiff's motivations in filing the motion are highly suspect; dismissing this suit as moot and vacating the judgment could result in unfairness to the Defendant by exposing the Agency to the possibility of renewed actions by the Plaintiff.

We deny Plaintiff's motion to dismiss this suit and to vacate the district court's judgment because we do not

find the case moot; and even if the case were moot, vacatur could result in an unfair result for the Defendant.

III. Tribal Sovereignty Under the Clean Water Act

Albuquerque acknowledges that the 1987 amendment to the Clean Water Act authorizes the EPA to treat tribes as states. Act of Feb. 4, 1987, Pub. L. No. 100-4, tit. V, § 506, 101 Stat. 76 (codified as amended at 33 U.S.C. § 1377). Albuquerque contends, however, that 33 U.S.C. § 1377 does not allow tribes to establish water quality standards more stringent than federal standards and does not permit tribal standards to be enforced beyond tribal reservation boundaries.

In *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), the Supreme Court established a two-step approach to judicial review of agency interpretations of acts of Congress. First, the reviewing court must determine whether there is a clear and unambiguous congressional intent concerning the precise question at issue. If congressional intent is clear and unambiguous, then that intent is the law and must be given effect. A reviewing court proceeds to the second step "if the statute is silent or ambiguous with respect to the specific issue." *Id.* at 843. Then, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* The EPA, however, is entitled to considerable deference in its interpretation of the Clean Water Act because it is charged with administering the Act. *See Chevron*, 467 U.S. at 844; *see also Arkansas v. Oklahoma*, 503 U.S. 91, 112 (1992) (criticizing this Court for failing to afford the EPA's

interpretation of the Clean Water Act "an appropriate level of deference").

In regard to the first question at issue, we reach the second step of *Chevron* because congressional intent is unclear and ambiguous. Under Albuquerque's interpretation of § 1377, tribes could devise water quality standards which are neither more nor less stringent than federal standards. Albuquerque's statutory construction is based on a negative implication inferred from Congress's failure to incorporate all provisions of the Clean Water Act in § 1377(e). We find that Congress's intent is unclear and ambiguous in regard to § 1377(e) but that the EPA's construction of the 1987 amendment to the Clean Water Act is reasonable and permissible.

Congress's objective in the Clean Water Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the elimination of pollutant discharge into those waters. 33 U.S.C. § 1251(a). Through the Act, Congress designed a comprehensive regulatory scheme that recognized and preserved a primary role for the states in eliminating pollution from our waterways. 33 U.S.C. § 1251(b). The power of states under the Act is underlined by their ability to force the development of technology by setting stringent water quality standards that the EPA can enforce against upstream polluters. *See* 33 U.S.C. §§ 1311(k), 1341, 1342, 1370; *Arkansas*, 503 U.S. at 106 (holding that the EPA's requirement that NPDES dischargers must comply with downstream States' water quality standards was a reasonable exercise of the agency's statutory discretion pursuant to §§ 1341, 1342). In the Clean Water Act, Congress provided the EPA "substantial statutory discretion."

Arkansas, 503 U.S. at 107. Pursuant to the 1987 amendment of the Clean Water Act, the EPA can treat Indian tribes as states under the Act, provided that the tribes meet certain criteria listed in 33 U.S.C. § 1377(e) and 40 C.F.R. § 131.8(a).[8] The 1987 amendment further provides:

> (a) Policy
>
> Nothing in this section shall be construed to affect the application of section 1251(g) of this title, and all of the provisions of this section shall be carried out in accordance with the provisions of such section 1251(g) of this title.

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[8] To qualify as a state under the Act, an Indian tribe must submit an application to the EPA which includes: a statement that the tribe is recognized by the Secretary of the Interior; a descriptive statement demonstrating that the tribal governing body is currently carrying out substantial government functions over a defined area; a description of the tribe's authority to regulate water quality over certain waters; a description of the tribe's capability to administer an effective water quality standards program; and any additional documentation which the Administrator deems necessary to support a tribal application. 40 C.F.R. § 131.8 (1995).

Upon receipt of the application, the Regional Administrator will notify appropriate government entities of the tribe's application and the basis of the tribe's authority to regulate water quality. The Administrator provides a thirty-day period to receive comments on the tribe's assertion of authority. If comments challenge the tribe's authority, the Regional Administrator, after consulting with the Secretary of the Interior, shall determine whether the tribe meets the requirements of 40 C.F.R. § 131.8(a)(3) (1995). Once recognized as a state for purposes of the Act, a tribe may submit proposed water quality standards to EPA.

> Indian tribes shall be treated as States for purposes of such section 1251(g) of this title.
>
> . . . .
>
> (e) Treatment as States
>
> The Administrator is authorized to treat an Indian tribe as a State for purposes of subchapter II of this chapter and sections 1254, 1256, 1313, 1315, 1318, 1319, 1324, 1329, 1341, 1342, and 1344 of this title to the degree necessary to carry out the objectives of this section,. . . .

33 U.S.C. § 1377(a), (e).[9]

In its letter approving the Isleta Pueblo's standards, the EPA cites 33 U.S.C. § 1370 as the basis for Isleta Pueblo's authority to set water quality standards that are more stringent than those recommended by the EPA under the Clean Water Act.[10] Albuquerque argues that tribes cannot adopt discharge limits more stringent than those of the EPA because § 1377 does not make reference to § 1370. Section 1370 prohibits states from imposing standards which are less stringent than those imposed by the federal government, while acknowledging states' inherent right to impose standards or limits that are more

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[9] Section 1251(g) generally preserves the authority of states to regulate water within their jurisdiction. Together, §§ 1377 and 1251(g) preserve the authority of Indian tribes – acting as states – to regulate water within their jurisdiction.

[10] Appellant's App. at 966 (Letter from the EPA to the Pueblo of Isleta (Dec. 24, 1992)).

stringent than those imposed by the federal government.[11] 33 U.S.C. § 1370. Congress's intent in excluding § 1370 from § 1377(e) is unclear and ambiguous. We decline to read § 1377 as incorporating § 1370 because it was not explicitly included in § 1377(e), as other sections are.

The EPA, however, also construes § 1370 as a savings clause that merely recognizes powers already held by the states. 56 Fed.Reg. 64,886 (1991). Thus, Congress's failure to incorporate § 1370 into § 1377 does not prevent Indian tribes from exercising their inherent sovereign power to impose standards or limits that are more stringent than

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[11] Section 1370 provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

33 U.S.C. § 1370.

those imposed by the federal government. Indian tribes have residual sovereign powers that already guarantee the powers enumerated in § 1370, absent an express statutory elimination of those powers.[12] In *Arkansas*, the Court explained that § 1370 "only concerns *state* authority and does not constrain the *EPA's* authority," 503 U.S. at 107 (emphasis in original); likewise, we do not view § 1370 as implicitly constraining tribes' sovereign authority. We conclude that the EPA's construction of the 1987 amendment to the Clean Water Act – that tribes may establish water quality standards that are more stringent than those imposed by the federal government – is permissible because it is in accord with powers inherent in Indian tribal sovereignty.

In the second question at issue, Albuquerque argues that § 1377 does not expressly permit Indian tribes to enforce effluent limitations or standards under § 1311 to upstream point source dischargers outside of tribal boundaries. Albuquerque misconstrues the Clean Water Act by selectively reading isolated sections; the Clean Water Act is a comprehensive regulatory scheme, and it must be read as such. The express incorporation in § 1377(e) of §§ 1341 and 1342 gives the EPA the authority to issue NPDES permits in compliance with a tribe's

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[12] *See, e.g., United States v. Wheeler*, 435 U.S. 313, 323 (1978). For example, Indian tribes could use their water rights, which are an element of tribal sovereignty, to assert an action against upstream polluters or to recover damages for groundwater contamination. *See* Comment, *Indian Reserved Water Rights Doctrine and the Groundwater Question*, 19 Am. Indian L. Rev. 403, 441 n.297 (1994).

water quality standards.[13] Section 1341 authorizes states to establish NPDES programs with the EPA, and § 1342 authorizes the EPA to issue NPDES permits in compliance with downstream state's water quality standards. *See Arkansas*, 503 U.S. at 102, 107 (construing §§ 1341 and 1342 as giving the EPA authority to require an upstream NPDES discharger to comply with downstream state water quality standards). Under the statutory and regulatory scheme, tribes are not applying or enforcing their water quality standards beyond reservation boundaries.[14] Instead, it is the EPA which is exercising its own authority in issuing NPDES permits in compliance with downstream state and tribal water quality standards. In regard to this question, therefore, the 1987 amendment to the Clean Water Act clearly and unambiguously provides tribes the authority to establish NPDES programs in conjunction with the EPA. Under §§ 1311, 1341, 1342 and 1377, the EPA has the authority to require upstream NPDES dischargers, such as Albuquerque, to comply with downstream tribal standards.

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[13] While § 1377 incorporates § 1342, § 1342 incorporates § 1311 and thereby provides the EPA the authority to issue NPDES permits to upstream point source dischargers which are in compliance with downstream state's and tribe's water quality standards.

[14] Although, Indian tribes could have inherent jurisdiction over non-Indian conduct or non-Indian resources if there is "some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana v. United States*, 450 U.S. 544, 566 (1981) (citations omitted).

IV. APA's Notice and Comment Requirements Under the Clean Water Act's Regulatory Scheme

Albuquerque next claims that the EPA failed to comply with the procedural requirements of the Administrative Procedure Act [APA] in approving the Isleta Pueblo's water quality standards. 5 U.S.C. §§ 551-559, 701-706. Under the APA, we review agency action de novo to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard of review is a narrow one, and we are not empowered to substitute our judgment for that of the EPA. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

Albuquerque asserts that the EPA was engaged in informal rulemaking when it approved the Isleta Pueblo's standards, and, therefore, it claims that the EPA violated § 553 of the APA by failing to include a statement of basis and purpose for its action approving the Pueblo standards and by failing to provide for public notice and comment. *See* 5 U.S.C. § 553. Albuquerque urges us to set aside the EPA's approval of the Isleta Pueblo standards because of the EPA's failure to comply with procedures mandated by law. *See* 5 U.S.C. § 706(2)(D).

The intent of Congress expressed in the Clean Water Act, however, was to require states or tribes to provide for public participation in the adoption of water quality standards. Section 1313(c)(1) provides:

> The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year

> period . . .) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

33 U.S.C. § 1313(c)(1). Under the water quality standards provisions of the Clean Water Act, it is the states and tribes which conduct rulemaking proceedings.[15] This is in accord with Congress's intent to preserve a primary role for the states and tribes in eliminating water pollution. The results of state and tribal rulemaking proceedings are then presented to the EPA for approval. The Fourth Circuit has explained the EPA's limited role in reviewing water quality standards proposed by states, stating:

> EPA sits in a reviewing capacity of the state-implemented standards, with approval and rejection powers only. . . .
>
> . . . .
>
> *[S]tates* have the primary role, under § 303 of the CWA (33 U.S.C. § 1313), in establishing water quality standards. EPA's sole function, in this respect, is to review those standards for approval.

Natural Resources Defense Council v. EPA, 16 F.3d 1395, 1399, 1401 (4th Cir. 1993) (emphasis in original) (citation omitted). Congress clearly intended the EPA to have a

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[15] In contrast, Congress requires the EPA to conduct notice and comment rulemaking procedures when it promulgates federal water quality standards. 33 U.S.C. § 1313(c)(4). Section 1313 makes a clear distinction between the procedures required for approval of state standards and rulemaking to promulgate federal standards.

limited, non-rulemaking role in the establishment of water quality standards by states and tribes, and, consequently, no statement of basis or purpose for its actions was necessary.

Additionally, Congress provided the EPA sixty days for approval and ninety days for disapproval of water quality standards proposed by states and tribes. 33 U.S.C. § 1313(c)(3). Congress could not reasonably expect the EPA to conduct APA notice and comment rulemaking proceedings within sixty or ninety days. Thus, the time restriction for the EPA's review of state and tribal water quality standards supports our conclusion that Congress intended the EPA to have a very limited role and did not intend EPA to engage in informal rulemaking.

More important, however, public participation in the establishment of water quality standards occurs when states and tribes review or revise water quality standards. *See* 33 U.S.C. § 1313(c)(1) (requiring states to hold public hearings when reviewing or revising water quality standards). All comments submitted to a state or tribe during the comment period become part of the administrative record and are reviewed by the EPA in determining whether to approve the state's or tribe's proposed standards. Consequently, the purpose of public notice and comment under the APA is satisfied under the Clean Water Act without requiring the EPA to receive additional comments. The State of New Mexico has commented on the effectiveness of Congress's approach in the Clean Water Act and the potentially negative impact of Albuquerque's proposed approach:

> The Clean Water Act's approach, therefore, is to place the primary responsibility on states to adopt and implement their own water quality standards provided only that they cannot be *less* stringent than the Act requires. Nothing in the Act evidences any intent that EPA involve itself in the details or substance of the process, except only to make sure that the states have complied with the Act. Nor does the Act indicate any intent that EPA duplicate the hearing, notice, and comment process conducted by the State. To the contrary, the short time periods given to EPA imply the opposite, since full notice and comment procedures generally take many months. Indeed, the State of New Mexico's most recent triennial review, with its notice, comment, and hearing process, took more than a year to be completed.
>
> Not only would the expansive EPA review of the tribal water quality standards sought by the City duplicate the lengthy process already undertaken by the tribe itself in adopting the standards, it is doubly unnecessary because of the notice, comment, and hearing process entailed in issuance of NPDES permits. As it was, there was full opportunity for notice, comment and hearing both for adoption of the Isleta standards (conducted by the Pueblo) and for issuance of the City's NPDES permit (conducted by EPA). To require yet another detailed notice, comment and hearing process by EPA would be to inject more bureaucracy, delay and expense into an already lengthy process that allows ample opportunity for public input.

Brief of Amici Curiae New Mexico Environment Department and State of New Mexico *ex rel.* Tom Udall, at 10-11.

We conclude that the notice and comment requirements of the APA are satisfied by the Clean Water Act's procedural scheme and that the EPA has reasonably implemented the Act's procedural requirements.

In this case, the Isleta Pueblo gave public notice and provided for a comment period in establishing its proposed water quality standards. On June 8-11, 1991, the Isleta Pueblo published a notice of a public hearing on its proposed standards in the Albuquerque Journal, as required by 33 U.S.C. § 1313(c)(1). The Isleta Pueblo also mailed notice of the hearing to potentially interested parties, including the City of Albuquerque. The Isleta Pueblo held a public hearing on August 7, 1991. Later, an additional opportunity for notice, comment, and hearing was provided by the EPA in issuing Albuquerque's NPDES permit. Thus, a full and fair opportunity for public notice, comment, and hearing was provided in this case in accordance with the APA and the Clean Water Act.

V. The Rational Basis of the EPA's Approval of Isleta Pueblo's Standards

Albuquerque also claims that the EPA's approval of the Isleta Pueblo standards was unsupported by a rational basis on the record and was therefore arbitrary and capricious. Albuquerque argues that the EPA was required to reject the Isleta Pueblo's water quality standards unless the EPA had established its own record

based on a sound scientific rationale for each particular provision.[16]

The EPA, however, reviews proposed water quality standards only to determine whether they are stringent enough to comply with the EPA's recommended standards and criteria. If the proposed standards are more stringent than necessary to comply with the Clean Water Act's requirements, the EPA may approve the standards without reviewing the scientific support for the standards. Whether the more stringent standard is attainable is a matter for the EPA to consider in its discretion; sections 1341 and 1342 of the Clean Water Act permit the EPA and states to force technological advancement to attain higher water quality. *See United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977); *Homestake Mining Co. v. EPA*, 477 F. Supp. 1279, 1283 (D. S.D. 1979). The EPA's letter approving the Isleta Pueblo standards explains that it is approving the standards, despite their departure from the EPA's guidelines, based on the Tribe's authority to adopt standards more stringent than the minimum requirements of the Clean Water Act.[17]

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[16] Albuquerque has repeatedly complained that the Isleta Pueblo standards are unattainable, totally irrational, and would place excessive economic burdens on the City. These complaints are belied by the NPDES permit settlement which applies the Isleta Pueblo standards to Albuquerque. Presumably, Albuquerque would not have agreed to the NPDES permit settlement if the water quality standards placed impossible demands on it.

[17] Appellant's App. at 966 (Letter from the EPA to the Pueblo of Isleta (Dec. 24, 1992)). See our discussion of the Tribe's authority to adopt standards more stringent than the minimum required by the Clean Water Act, *infra* Part III.

The EPA considered Isleta Pueblo's rationale for each of the standards challenged by Albuquerque, and the tribe's record contains detailed responses to all of the criticisms expressed by the EPA and Albuquerque. The record contains a detailed explanation of the Isleta Pueblo's scientific, technical, and policy reasons for choosing to establish more stringent standards. For example, the Isleta Pueblo stated that stringent standards are justified because of prevailing drought conditions and the need to protect sensitive subpopulations. The EPA concluded that the standards were consistent with the Clean Water Act's requirements and should therefore be approved. The arbitrary and capricious review standard is very deferential; "an agency ruling is 'arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem.' " *Arkansas*, 503 U.S. at 113 (citation omitted). Albuquerque has not shown that the EPA failed to consider an important aspect of the Isleta Pueblo's water quality standards.

Additionally, the essence of Albuquerque's complaint is with the policy choice of Congress and the EPA to afford states and tribes the ability to force the development of technology through more stringent water quality standards. "It is not our role . . . to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to the Environmental Protection Agency." *Arkansas*, 503 U.S. at 114.

In its next claim, Albuquerque argues that the Isleta Pueblo criteria approved by the EPA are not stringent enough to protect the Tribe's designated use standard described as primary contact ceremonial use. The Tribe describes primary contact ceremonial use as involving the

"immersion and intentional or incidental ingestion of water." Albuquerque argues that this requires the river water quality to meet the standards of the Safe Drinking Water Act, 42 U.S.C. § 300f, and the Isleta Pueblo's water quality criteria approved by the EPA fail to protect water used under the ceremonial use standard.

As the district court stated:

> This argument seems far-fetched. The primary contact ceremonial use appears to resemble a fishable/swimmable standard, which assumes the ingestion of some water, more than it resembles a safe drinking water standard, which assumes the ingestion of a volume of water daily.

Albuquerque, 865 F. Supp. at 740. The federal drinking water standards apply only to a "public water system," which is defined as a system supplying piped water for human consumption serving at least twenty-five persons or having at least fifteen service connections. 42 U.S.C. § 300f(4). The Isleta Pueblo's ceremonial use standard does not convert the Rio Grande River into a public water system. The EPA considered and approved this aspect of the Isleta Pueblo water quality standards. We decline to second-guess the EPA's technical determination, which is entitled to substantial deference, that the Isleta Pueblo's water quality criteria adequately protect its ceremonial designated use standard.

VI. The EPA's Dispute Resolution Process

The 1987 amendment directs the EPA Administrator to establish "a mechanism for the resolution of any unreasonable consequences that may arise as a result of differing water quality standards that may be set by states and Indian tribes located on common bodies of water." 33 U.S.C. § 1377(e). In response to this directive, the EPA adopted regulations providing for mediation or arbitration to resolve disputes over unreasonable consequences of tribal water quality standards. *See* 40 C.F.R. 131.7. In developing the regulations, the EPA considered whether, in addition to the state and the tribe, affected parties should be involved in the resolution process, and determined that such parties could be invited to participate. The EPA regulations, however, permit only states and tribes to initiate the resolution process because they are the entities authorized to revise or modify the water quality standards in dispute.

Albuquerque argues that the EPA's dispute resolution mechanism fails to meet the statutory requirement because it deprives interested third parties from initiating the process and because its reliance on mediation and non-binding arbitration is inadequate to resolve such disputes. Section 1377(e) does not specify how or by whom the dispute resolution mechanism shall be initiated. Rather, § 1377(e) is worded to give the EPA Administrator broad discretion in establishing the dispute resolution process. The EPA's decision to use mediation and non-binding arbitration is consistent with the Clean Water Act's requirement that the EPA encourage cooperative activities by the states. 33 U.S.C. § 1253(a). The need for a dispute resolution mechanism to resolve unreasonable

consequences stems from the possibility that two sovereigns – a state and a tribe – may impose different water quality standards on a common body of water. It is reasonable, therefore, to allow only those two sovereigns to initiate the dispute resolution process to resolve their differences rather than to include affected permittees such as Albuquerque. As successfully occurred through the negotiated settlement in this case, the dispute resolution mechanism allows the state and tribe to invite third parties to participate. Courts reviewing an agency action should afford "the EPA's interpretation of the governing law an appropriate level of deference." *Arkansas*, 503 U.S. at 112 (citing *Chevron*, 467 U.S. at 842-44). The EPA's establishment of a dispute resolution mechanism that relies on tribal and state cooperation to address unreasonable consequences was a reasonable interpretation of § 1377(e) and is entitled to deference.

VII. The Tribe's Ceremonial Usage and the Establishment Clause

Albuquerque next claims that the EPA's approval of the Pueblo's ceremonial use designation offends the Establishment Clause of the First Amendment. The First Amendment provides in relevant part: "Congress shall make no law respecting an establishment of religion. . . . " U.S. Const. amend. I. Government action does not violate the Establishment Clause if "[t]he challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion." *Lamb's Chapel v. Center Moriches Union Free*

School District, 508 U.S. 384, 394 (1993) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).[18]

The EPA approved Isleta Pueblo's promulgation of "Primary Contact Ceremonial Use" as a designated use of the Rio Grande River within the boundaries of the Indian reservation. The tribe defines "Primary Contact Ceremonial Use" as "the use of a stream, reach, lake, or impoundment for religious or traditional purposes by members of the PUEBLO OF ISLETA; such use involves immersion and intentional or incidental ingestion of water."[19] Appellant's App. at 1254. Albuquerque argues that the EPA's approval of this standard violates all three aspects of the Establishment Clause under *Lemon*.

First, Albuquerque argues that the reason for the designated use is explicitly sectarian. The secular purpose requirement does not mean that a law's purpose must be unrelated to religion because that would require " 'that the government show a callous indifference to religious groups,' . . . and the Establishment Clause has never been so interpreted." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987) (citation omitted). The EPA's approval of the primary contact ceremonial use designation serves a clear secular purpose: promotion of the goals of the Clean Water Act. The EPA's purpose in approving the

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[18] In *Lamb's Chapel* the Court notes that the continued validity of *Lemon* has come into question, but it "has not been overruled." 508 U.S. at 395 n.7.

[19] It is noteworthy that the ceremonial use encompasses water used for either religious or traditional purposes.

designated use is unrelated to the Isleta Pueblo's religious reason for establishing it. The Isleta Pueblo's designation of a ceremonial use does not invalidate the EPA's overall secular goal.

Second, Albuquerque claims that the EPA's action has a primary effect of advancing religion. We disagree. The EPA is not advancing religion through its own actions, and it is not promoting the Isleta Pueblo's religion. The primary effect of the EPA's action is to advance the goals of the Clean Water Act.

Third, Albuquerque asserts the designated use results in excessive governmental entanglement with religion because the Pueblo and the EPA must inquire on an ongoing basis whether the standards adequately protect religious uses of the river water. This argument is meritless. "There is no genuine nexus between" the EPA's approval of the ceremonial use standard "and establishment of religion," *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 675 (1970), and the EPA's approval of the standard provides only an incidental benefit to religion. *See Lamb's Chapel*, 508 U.S. at 395.[20] The EPA's approval of the ceremonial use standard does not require

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[20] If anything, the agency's approval furthers the free exercise of religion, consistent with the policy expressed in the American Indian Religious Freedom Act. *See* 42 U.S.C. § 1996 (Supp. 1994) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, . . . including but not limited to . . . the freedom to worship through ceremonials and traditional rites.").

any governmental involvement in the Isleta Pueblo's religious practices. Excessive governmental entanglement will not result when the EPA incorporates the Isleta Pueblo's water quality standards in issuing future NPDES permits.

The district court correctly rejected Albuquerque's Establishment Clause claim.

VIII. Isleta Pueblo's Standards and Vagueness

Albuquerque asserts that the Isleta Pueblo's standards were so vague as to deprive Albuquerque of due process. We will not declare a regulation unconstitutionally vague if it puts the regulated party on notice as to what conduct is required. *See Komjathy v. National Transp. Safety Bd.*, 832 F.2d 1294, 1297 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1057 (1988); *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1387 (D.C. Cir. 1985). There is a strong presumption that regulations are not unconstitutionally vague if the regulated party has the means of obtaining clarification either by making inquiry or through an administrative process. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982).

Albuquerque complains that the Isleta Pueblo standards use unconstitutionally vague narrative terms, such as " '*objectionable* . . . floating materials,' '[c]ontaminants [which] . . . impart *unpalatable* flavor to fish,' 'nutrients [which] produce *objectionable* algal densities,' 'waters [which are] . . . *virtually free* of pathogens,' and 'turbidity [which] causes an *unaesthetic and substantial* visible contrast.' " Appellant's Br. at 48-49 (alterations, emphasis,

and omissions in original). Albuquerque appears to misunderstand the process established by the EPA under the Clean Water Act. The EPA regulations allow water quality standards, such as the Isleta Pueblo standards, to be narrative descriptions. 40 C.F.R. § 131.11 (1995). These standards, however, do not require any particular conduct by Albuquerque; instead, Albuquerque is on notice that its revised NPDES permit may contain the specific standards which must be satisfied. Plaintiff's claim of vagueness is without merit because an administrative procedure is in place through which it will have notice of the specific enforceable standards that it must meet.

IX. Conclusion

For the foregoing reasons, we AFFIRM the district court's denial of Plaintiff's motion for summary judgment and its granting of Defendant's motion for summary judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

CITY OF ALBUQUERQUE, Plaintiff,	)	
v.	)	No. 93-82-M Civil
CAROL M. BROWNER, Administrator, United States Environmental Protection Agency, Defendant.	)	

MEMORANDUM OPINION
AND
ORDER

(Filed Oct. 21, 1993)

This matter comes on for consideration on cross motions for summary judgment filed June 11, 1993. Having reviewed the motions, responses and replies, and being otherwise fully apprised in the premises, I find that defendants' motion is well taken and will be granted and that plaintiff's motion is not well taken and will be denied.

The City filed suit under the **Administrative Procedures Act, 5 U.S.C. § 500** and under the **Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202.** This Court is authorized to review the actions of federal agencies under the **Administrative Procedures Act, 5 U.S.C. § 500.**

BACKGROUND

This case concerns the quality of Rio Grande water south of Albuquerque where the river flows through Isleta Pueblo. The river runs north to south through New Mexico before turning east and south to form the border between Texas and Mexico. Albuquerque's waste treatment facility outfall is approximately five files north of the Isleta Pueblo boundary.

The waste treatment facility discharges to the Rio Grande under a National Pollution Discharge Elimination System (hereinafter "NPDES") permit issued by the U.S. Environmental Protection Agency (hereinafter "EPA"). EPA sets permit discharge limits for the facility to meet New Mexico's water quality standards. EPA revised the City's NPDES permit a year ago to reflect the State's new, more stringent standards. On October 12, 1992, while that revision was in progress, EPA recognized Isleta Pueblo as a state for purposes of the **Clean Water Act, § 518(e), 33 U.S.C. § 1377(e)**. EPA delayed issuing the City's revised permit until the Pueblo's proposed water quality standards were approved. EPA approved the Pueblo's standards on December 24, 1992, and is preparing a NPDES permit for the City wastewater treatment facility that will meet the Pueblo's standards as well as the State's. The Pueblo's standards are more stringent than the State's. The City of Albuquerque challenges the agency's approval of Isleta Pueblo's water quality standards.

The City filed a complaint on January 25, 1993, and on February 2, 1993, moved this court for a temporary restraining order and then for a preliminary injunction. After a hearing on February 17, 1993, I denied both

requests. The City amended its complaint on March 16, 1993, and renewed its motion for a preliminary injunction on July 23, 1993, after receiving EPA's Draft NPDES permit. The parties filed cross motions for summary judgment on June 11, 1993, and submitted responses and replies to one another's motions.

The City challenges the agency's approval of the Pueblo's water quality standards on several grounds. Specifically, the City alleges that EPA failed to follow the required procedures in approving the standards, misinterpreted two provisions of the Act in approving the standards, and approved standards that are unconstitutional. Further, the City asserts that EPA violated the Act by failing to provide a mechanism to resolve unreasonable consequences which arise when a State and a Tribe impose different standards on a common body of water, and by failing to ensure that the Pueblo standards are stringent enough to protect the designated uses. Finally the City asserts that the Pueblo's water criteria are without any rational scientific basis and should not have been approved.

DISCUSSION

The parties dispute the appropriate scope of the court's review and the materials which properly form the record for review.

A. Scope of Review

The City asks this court to review the agency's decision under the Administrative Procedures Act, 5 U.S.C.

§ 551 (hereinafter "APA"). The City also asserts jurisdiction under the **Declaratory Judgment Act 28 U.S.C. §§ 2201, 2202,** and argues that the court's authority under the **Declaratory Judgment Act** expands the record available for judicial review beyond the administrative record compiled by the agency. The City cites no authority for this argument, EPA's position is that the court may properly review only the administrative record the agency reviewed in making the challenged decision. ***Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985).** The reviewing court does not review the fact *de novo* or reach an independent conclusion. ***Id.* at 744.** The **Declaratory Judgment Act** is not an independent grant of jurisdiction and does not enlarge the parties' substantive rights. Action brought under the **Declaratory Judgment Act** does not alter the scope of review. ***Davis v. United States Dept. of Housing*, 627 F.2d 942 (9th Cir. 1980).**

The agency is correct but the argument is of no matter in this case. The information relied on by the City is incorporated into the administrative record in the form of comments to the Pueblo or to EPA, or was presented at the February 17 hearing. I consider the administrative record in reviewing the agency's decision to approve Isleta's standards, but I cannot fail to take notice of the information presented in the hearing, much of which the agency did not dispute.

I review the EPA's decision to approve Isleta's water quality standards to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . without observance of procedure required by law; . . . [or] unsupported by substantial evidence. . . . " **Administrative Procedures Act, 5**

U.S.C. § 706(2). The arbitrary and capricious standard demands considerable deference to agency decisions and presumes the validity of the agency's action. ***Colorado Health Care Ass'n v. Colorado Dept. of Social Services*, 842 F.2d 1158, 1164 (10th Cir. 1988).** The substantial evidence inquiry is whether the agency based its decision on relevant evidence a reasonable mind might accept as appropriate to support such a decision. ***Foust v. Lujan*, 942 F.2d 712, 714 (10th Cir. 1991).**

The standard of review is very narrow. The reviewing court must affirm a reasoned decision which is supported by substantial evidence in the record. ***Shell Oil v. Costle*, 595 F.2d 224 (5th Cir. 1979).** Judicial review is especially deferential where the agency interprets its own regulations. ***Roberts v. Methow Valley Citizen's Council*, 490 U.S. 332, 358-59 (1989).** The agency has broad discretion when faced with conflicting technical opinions. ***Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1524 (10th Cir. 1992).** The reviewing court must affirm a reasoned decision which rests on a review of all relevant information, even if the reviewing court would not have reached the same conclusion. ***Citizens to Preserve Overton Park Inc. v. Volpe*, 401 U.S. 402, 416 (1971).** The City here misconstrues the endpoint of judicial review. Were I to find the agency acted arbitrarily or outside the scope of its authority, I may order it to reconsider its decision in light of additional relevant information, but I may not impose a new decision on the agency. ***Florida Power & Light Co.* at 744.**

B. Statutory Requirements

The **Clean Water Act (hereinafter "Act")** is a comprehensive statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" through the reduction and eventual elimination of pollutant discharge into those waters. **Clean Water Act § 101(a), 33 U.S.C. 1251(a).** The Act anticipates a partnership between the federal government and the States in cleaning up the nation's waterways. **Clean Water Act § 101(b), 33 U.S.C. § 1251(b).** States are free to set water quality standards so as to force the development of technology. ***United States Steel Corp. v. Train,* 556 F.2d 822, 838 (7th Cir. 1977).**

In 1987, Congress revised the **Act,** authorizing the EPA Administrator to treat Indian Tribes as States for the purposes of the **Clean Water Act** so long as the Tribes meet certain enumerated criteria. **Clean Water Act § 518, 33 U.S.C. § 1377.** A Tribe which meets the criteria listed in **§ 518(e), 33 U.S.C. § 1377(e)** and **40 C.F.R. § 131.8(a),** may submit an application to the EPA that includes: a statement that the Secretary of the Interior recognizes the Tribe; a statement documenting that the current Tribal governing body carries out substantial government functions; and description of the Tribe's authority to regulate water quality; a description of the Tribe's ability to administer a water quality standards program; and any additional information the Administrator may require. **40 C.F.R. § 131.8 (1992).**

Upon receipt of the application, the Regional Administrator will notify appropriate government entities of the Tribe's application and the basis of the Tribe's authority

to regulate water quality. The Administrator provides a thirty-day period to receive comments on the Tribe's assertion of authority. If comments challenge the Tribe's authority, the Regional Administrator, after consulting with the Secretary of the Interior, shall determine whether the Tribe meets the requirements of **40 C.F.R. § 131.8(a)(3) (1992).**

Once recognized as a State for purposes of the **Act**, a Tribe may submit proposed water quality standards to EPA. The **Act** provides for two measures of water quality. One measure is an "effluent limitations guideline." Effluent limitation guidelines are uniform, technology-based standards, promulgated by EPA, which restrict the quantities, rates and concentrations of specified substances discharged from point sources. ***See*** **Clean Water Act §§ 301 and 304, 33 U.S.C. §§ 1311, 1314.** The other measure of water quality is a "water quality standard." Unlike the technology-based effluent limitations guidelines, water quality standards are not based on pollution control technologies, but express the desired condition or use of a particular waterway. Water quality standards supplement technology-based effluent limitations guidelines "so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." ***Environmental Protection Agency v. California ex re. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976).**

Water quality standards consist of three elements: (1) one or more designated "uses" of each waterway (*e.g.*, public water supply, recreation, or agriculture) consistent with the goals of the **Act** as articulated in **§ 101**; (2)

"criteria" expressed in numerical concentration levels or narrative statements specifying the amount of various pollutants that may be present in the water and still protect the designate uses; and (3) an anti-degradation provision. **Clean Water Act 303 (c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. Part 131 (1992).**

EPA provides States with substantial guidance in drafting water quality standards. Section 304(a) of the Act requires EPA to develop criteria for water quality that reflect the latest scientific knowledge, and to provide those criteria to the States as guidance. **Clean Water Act § 304(a), 33 U.S.C. § 1314(a).** The States are free to draw upon EPA's recommended water quality criteria, but are equally free to use other criteria for which they have sound scientific support. *See* **48 Fed. Reg. 51,400, 51,411 (1983).**

Prior to adopting or revising any water quality standard, the state must provide notice and an opportunity for a public hearing. **40 C.F.R. § 131.10 (1992).** States must adopt criteria that protect the designated uses. **40 C.F.R. § 131.11 (1992).** The criteria may be based on EPA guidance, EPA guidance modified to reflect conditions at the site, or on other scientifically defensible methods. *Id.*

After adoption, the States must submit the water quality standards to EPA for review and approval. **Clean Water Act § 303(c)(2), 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.20(c) (1992).** EPA reviews the Sate's [sic] water quality standards to ensure they are consistent with the **Act's** requirements. **Clean Water Act § 303(c)(3), 33 U.S.C. § 1313(c)(3).** If EPA concludes that the standards are inconsistent with the **Act**, the agency must notify the

State of that fact within ninety days and specify the changes necessary to bring the proposed standards into compliance. **Clean Water Act § 303(c)(3), 33 U.S.C. § 1313(c)(3).** If the State fails to adopt the specified changes within ninety days, the agency will promptly propose a federal water quality standard, and will issue a final federal standard within 30 days of proposal. **Clean Water Act § 303(c)(4)(A), 33 U.S.C. § 1313(c)(4)(A).**

C. Procedural Challenges

The City asserts that the agency failed to meet procedural requirements imposed on all agency rulemaking by the **Administrative Procedures Act, 5 U.S.C. § 553.** Specifically, the City argues that approval of Isleta's standards was rulemaking, and the agency had to give the public notice and provide for a comment period prior to approving the standards. ***Buckeye Power, Inc. v. EPA,* 481 F.2d 162, 170 (6th Cir. 1973)** (approval of state standards under the **Clean Air Act** is rulemaking subject to procedural requirements of the **Administrative Procedures Act, 5 U.S.C. § 553).**

States must hold public hearings when reviewing or revising water quality standards. **Clean Water Act § 303(c); 33 U.S.C. § 1313(c).** On June 11-11, 1991, the Pueblo published notice of a public hearing on its proposed standards in the Albuquerque Journal, as required by **§ 303(c)(1) of the Act, 33 U.S.C. § 1313(c)(1).** The Pueblo also mailed notice of the hearing to potentially interested parties, including the City. The Pueblo held a public hearing on August 7, 1991. When the agency issues a federal water quality standard, it must provide public

notice and comment. **Clean Water Act § 303(b), 33 U.S.C. § 1313(b)**. However, EPA asserts that it need not provide notice and comment prior to approving state water quality standards for several reasons. First, the plain language of the **Act** requires the agency to provide notice when it promulgates a standard and requires states to provide notice when they promulgate or revise standards. If Congress wanted the agency to provide additional notice upon approving state standards, it could have included that language in **§ 303(c)(1)**. Second, all comments submitted to a State or Tribe during the comment period become part of the administrative record and are reviewed by the Administrator in deciding whether to accept or reject the State's proposed standards. ***Id.*** Therefore, the purpose of notice and comment is satisfied under the **Act** without an additional comment period. No purpose is severed by requiring the Administrator to receive comments. Finally, the statute allows the Administrator sixty days to approve State standards, and the time frame precludes another notice and comment period. I am persuaded that the purposes of the APA are met under the **Act's** procedural scheme, that the agency has reasonably implemented the **Act's** procedural requirements and has committed no procedural error.

D. Sections 510 and 518

The City next argues that EPA improperly implemented **§ 518**, authorizing EPA to treat Tribes as States, when it incorrectly determined that **§ 510** of the **Act** applies to Tribes as well as to states. Sections 510 forbids any state from imposing any "effluent limitation, or other limitation, effluent standard, prohibition, pretreatment

standard, or standard of performance" which is less stringent than federal standards. **Clean Water Act § 510, 33 U.S.C. § 1370.** The section preserves the state's right to impose standards or limits that are more stringent than those imposed by the federal government. ***Id.*** Section 518 does not reference § 510, but it does incorporate § 303, authorizing States to develop water quality standards. Under the City's reading of § 518, Tribes would be authorized to develop water quality standards neither more nor less stringent than federal standards. This Construction makes § 518 meaningless and conflicts with EPA's stated policy with respect to Indian Tribes and with general principles of federal Indian law. ***See State of Washington Department of Ecology v. Environmental Protection Agency,* 752 F.2d 1465, 1471 (9th Cir. 1985).** EPA has consistently interpreted § 518 to include § 510, and has interpreted § 510 as a savings clause, recognizing an authority already held by the states rather than conferring some new authority. **56 Fed. Reg. 64,886 (1991).**

EPA's position is further supported by the reference to § 1341 in § 518. Section 1341 appears to require EPA to issue permits that comply with a downstream state's water quality standards. **Clean Water Act § 401, 33 U.S.C. § 1341; *Arkansas v. Oklahoma,* ___ U.S. ___, 112 S.Ct. 1046, 1055 n.9 (1992).** The Supreme Court found that, even if the Act does not require the upstream discharger to comply with downstream state standards, the statute does not limit EPA's authority to require such compliance. ***Arkansas v. Oklahoma,* 112 S.Ct. at 1056.** I believe the same argument must apply to an upstream discharger and a downstream Tribe. I find no support for the City's

position on this issue and hold that EPA properly recognized the Pueblo's authority to develop water quality standards more stringent than those of the federal government.

E. Mechanism to Resolve Unreasonable Consequences

The **Act** directs the Administrator to establish a mechanism for resolving any unreasonable consequences arising when a State and a Tribe impose different water quality standards on a common body of water. **Clean Water Act § 518(e), 33 U.S.C. § 1377(e)**. The City complains that EPA's regulations only allow a State or a Tribe to initiate the resolution process, and therefore the mechanism fails to meet statutory requirements. In developing the regulations the EPA considered whether, in addition to the State and the Tribe, affected parties should be involved in the resolution process and determined that such parties could be invited to participate. However, the EPA allows only States and Tribes to initiate the resolution process because they are the entities authorized to revise or modify the water quality standards in question. I find that EPA's regulations meet the statutory mandate, were developed after careful consideration of relevant factors and are not arbitrary or capricious.

F. Failure to Protect Designated Uses

The City next changes gears to argue that the EPA improperly accepted Pueblo standards that are not stringent enough to protect the designated uses, specifically

primary contact ceremonial use and primary contact recreational use. Pueblo members are reluctant to describe what ceremonial use of the river entails, but the parties agree that this use includes some ingestion of water. The City assumes that this use therefore requires the river to meet **Safe Drinking Water Act, 42 U.S.C. § 300f,** standards. The proposed water quality standards do not ensure drinking water quality in the river and, therefore, the City argues that EPA improperly approved the standards.

This argument seems far-fetched. The primary contact ceremonial use appears to resemble a fishable/swimmable standard, which assumes the ingestion of some water, more than it resembles a safe drinking water standard, which assumes the ingestion of a volume of water daily. None of the comments recorded in the administrative record, including those made by the City, cautioned the Pueblo or the EPA that the standards are not stringent enough and I reject the argument.

G. Standards are Unconstitutional

The City first suggests that the EPA, in recognizing a ceremonial use standard, has violated the Constitution's Establishment Clause by imposing a mandate which aids tribal religion at City expense. Both the City and EPA correctly cite ***Lemon v. Kurtzman*, 403 U.S. 602 (1971)** as the proper analytical framework for this question. EPA asserts that the primary purpose of the designated uses is to support the goals of the **Clean Water Act**. The Pueblo's designation of a ceremonial use does not invalidate the overall secular goal. The EPA here does not advance

religion through its own actions, and is not promoting the Pueblo's religion. There is certainly no excessive entanglement here between the government and religion and I reject the City's Establishment Clause argument.

The City also argues that the standards are unconstitutionally vague. The City's vagueness argument is insupportable. A regulation will not be deemed impermissibly vague as long as it puts the regulated party on notice as to what conduct is required. ***Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377 (D.C. Cir. 1985)**. Water quality standards, both desired uses and criteria, may be merely narrative descriptions. **40 C.F.R. §§ 131.1 and 131.2 (1992)**. The standards alone do not require any particular conduct by the City. Rather, the City will have notice of specific enforceable standards it must meet when EPA issues the City's revised NPDES permit.

H. Rational Basis, Unattainable

The City cites technical information outside the administrative record to support its argument that the Pueblo standards are unattainable. Much of this information was presented in court. It is clear that the City raises realistic technical concerns. However, EPA reviews proposed water quality standards only to determine if they are stringent enough to protect the proposed water quality standards. **40 C.F.R. §§ 131.5; 131.11(a) (1992)**. The EPA does not believe it is authorized to reject proposed standards because they are more stringent than background levels. **56 Fed.Reg. 64,886 (1991)**. EPA lacks the authority to reject stringent standards on the grounds of harsh economic or social effects. ***Homestake Mining Co.***

v. Environmental Protection Agency, 477 F.Supp. 1279, 1283 (D.S.D. 1979).

In reviewing the administrative record I find that the agency and the Pueblo conferred extensively about technical aspects of the proposed standards and the Pueblo was able to document, to the agency's satisfaction, the technical basis for the standards. For example, the City argues that the Pueblo should include provisions in the standards for low flow periods, during which standards should be less stringent. The City asserts that the lack of such provision makes the standards unattainable and too expensive, and that they are therefore arbitrary and capricious. When EPA suggested the Pueblo consider a relaxation of the standards during low flow periods, the Pueblo replied that members generally use the river more intensively for ceremonial purposes during low flows, and it would be particularly inappropriate to relax standards at those times. There are a number of examples in the administrative record where the Pueblo provides EPA with cogent reasons for retaining more stringent standards. The arbitrary and capricious review standard is very deferential so long as the reviewing court can discern the agency's journey from the factual record to the decision. *American Littoral Society v. Herndon*, 720 F.Supp. 942, 950 (S.D.Fla. 1988). The agency has adequately supported its decision-making process and I must uphold EPA's action to approve the Pueblo's water quality standards.

Although under the standard of review imposed by the APA I must uphold the agency decision in this case, I note that the city raises some very troubling issues here. I also note EPA's apparently inconsistent position with

respect to NPDES permits affecting water quality standards of downstream states. The EPA has argued that the proper criterion to measure the effectiveness of a discharge limit in meeting a downstream standard is whether the discharge will measurably effect the water quality in the downstream river. ***Arkansas v. Oklahoma,*** **112 S.C. at 1052.** The legal issues in that case are distinguished because the focus in ***Arkansas*** was on the downstream state's anti-degradation policy rather than the designated uses and criteria challenged here. Oklahoma challenged EPA's reluctance to impose stricter discharge limits in the NPDES discharge permit issued to an upstream facility. The Supreme Court recognized the agency's authority to require compliance with the downstream state standards, and affirmed EPA's determination that the proposed permit would not measurably effect Oklahoma's water quality. EPA's conclusion that downstream water quality would be unaffected by the discharge was based on evidence in the record. In this case, EPA is prepared to include limits in the City's NPDES permit to ensure that discharged water at the facility outfall meets the water quality standards of the downstream state without first concluding that the quality of the river water five miles further downstream will be measurably improved. For example, the Pueblo's arsenic standard for the Rio Grande is three orders of magnitude (1000 times) more stringent that the federal Safe Drinking Water Standard, and is below the concentration that can be accurately measured by current laboratory equipment. EPA will impose this stringent limit on the City despite the fact that arsenic occurs naturally in Albuquerque's

ground water at relatively high levels and is not discharged to the water by industrial polluters. If pure water is discharged at the City's outfall, it is possible that the arsenic levels in water flowing through the Pueblo will remain relatively high. I raise this issue of the agency's apparent inconsistency because it is one I find troubling. However, it relates to the issuance of a NPDES permit, and it is not a question that this court has jurisdiction to address.

CONCLUSION

I find that EPA followed the necessary procedural steps in accepting Isleta Pueblo's proposed water quality standards. I also find that the agency decision was made after consideration of all the relevant factors and was neither arbitrary, capricious nor an abuse of discretion. The agency acted in accordance with the law and its decision is supported by substantial evidence in the administrative record. The City's motion for summary judgment is denied. The EPA's motion for summary judgment is granted.

IT IS SO ORDERED.

/s/ Edwin L. Mechem
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CITY OF ALBUQUERQUE,

Plaintiff-Appellant,

v.

CAROL BROWNER, or her successor as Administrator, United States Environmental Protection Agency

Defendant-Appellee

THE WESTERN COALITION OF ARID STATES; METROPOLITAN SEWERAGE AGENCIES; NEW MEXICO MUNICIPAL LEAGUE, INC.; NEW MEXICO ENVIRONMENT DEPARTMENT; STATE OF NEW MEXICO,

Amici Curiae.

No. 93-2315

ORDER

Entered January 7, 1997

Before HENRY and McKAY, Circuit Judges, and JENKINS*, Senior District Judge.

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*Honorable Bruce S. Jenkins, Senior District Judge, United States District Court for the District of Utah, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX D

33 U.S.C. § 1313

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new

standard is not consistent with the applicable requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved –

> (A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or
>
> (B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

APPENDIX E

40 C.F.R. § 131.7 Dispute resolution mechanism.

(a) Where disputes between States and Indian Tribes arise as a result of differing water quality standards on common bodies of water, the lead EPA Regional Administrator, as determined based upon OMB circular A-105, shall be responsible for acting in accordance with the provisions of this section.

(b) The Regional Administrator shall attempt to resolve such disputes where:

(1) The difference in water quality standards results in unreasonable consequences;

(2) The dispute is between a State (as defined in § 131.3(j) but exclusive of all Indian Tribes) and a Tribe which EPA has determined qualifies to be treated as a State for purposes of water quality standards;

(3) A reasonable effort to resolve the dispute without EPA involvement has been made;

(4) The requested relief is consistent with the provisions of the Clean Water Act and other relevant law;

(5) The differing State and Tribal water quality standards have been adopted pursuant to State and Tribal law and approved by EPA; and

(6) A valid written request has been submitted by either the Tribe or the State.

(c) Either a State or a Tribe may request EPA to resolve any dispute which satisfies the criteria of paragraph (b) of this section. Written requests for EPA

involvement should be submitted to the lead Regional Administrator and must include:

(1) A concise statement of the unreasonable consequences that are alleged to have arisen because of differing water quality standards;

(2) A concise description of the actions which have been taken to resolve the dispute without EPA involvement;

(3) A concise indication of the water quality standards provision which has resulted in the alleged unreasonable consequences;

(4) Factual data to support the alleged unreasonable consequences; and

(5) A statement of the relief sought from the alleged unreasonable consequences.

(d) Where, in the Regional Administrator's judgment, EPA involvement is appropriate based on the factors of paragraph (b) of this section, the Regional Administrator shall, within 30 days, notify the parties in writing that he/she is initiating an EPA dispute resolution action and solicit their written response. The Regional Administrator shall also make reasonable efforts to ensure that other interested individuals or groups have notice of this action. Such efforts shall include but not be limited to the following:

(1) Written notice to responsible Tribal and State Agencies, and other affected Federal agencies,

(2) Notice to the specific individual or entity that is alleging that an unreasonable consequence is resulting

from differing standards having been adopted on a common body of water,

(3) Public notice in local newspapers, radio, and television, as appropriate,

(4) Publication in trade journal newsletters, and

(5) Other means as appropriate.

(e) If in accordance with applicable State and Tribal law an Indian Tribe and State have entered into an agreement that resolves the dispute or establishes a mechanism for resolving a dispute. EPA shall defer to this agreement where it is consistent with the Clean Water Act and where it has been approved by EPA.

(f) EPA dispute resolution actions shall be consistent with one or a combination of the following options:

(1) *Mediation.* The Regional Administrator may appoint a mediator to mediate the dispute. Mediators shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications.

(i) Where the State and Tribe agree to participate in the dispute resolution process, mediation with the intent to establish Tribal-State agreements, consistent with Clean Water Act section 518(d), shall normally be pursued as a first effort.

(ii) Mediators shall act as neutral facilitators whose function is to encourage communication and negotiation between all parties to the dispute.

(iii) Mediators may establish advisory panels to consist in part of representatives from the affected parties, to study the problem and recommend an appropriate solution.

(iv) The procedure and schedule for mediation of individual disputes shall be determined by the mediator in consultation with the parties.

(v) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.

(2) *Arbitration.* Where the parties to the dispute agree to participate in the dispute resolution process, the Regional Administrator may appoint an arbitrator or arbitration panel to arbitrate the dispute. Arbitrators and panel members shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. The Regional administrator shall select as arbitrators and arbitration panel members individuals who are agreeable to all parties, are knowledgeable concerning the requirements of the water quality standards program, have a basic understanding of the political and economic interests of Tribes and States involved, and are expected to fulfill the duties fairly and impartially.

(i) The arbitrator or arbitration panel shall conduct one or more private or public meetings with the parties and actively solicit information pertaining to the effects of differing water quality permit requirements on upstream and downstream dischargers, comparative risks to public health and the environment, economic impacts, present and historical water uses, the quality of the

waters subject to such standards, and other factors relevant to the dispute, such as whether proposed water quality criteria are more stringent than necessary to support designated uses, more stringent than natural background water quality or whether designated uses are reasonable given natural background water quality.

(ii) Following consideration of relevant factors as defined in paragraph (f)(2)(i) of this section, the arbitrator or arbitration panel shall have the authority and responsibility to provide all parties and the Regional Administrator with a written recommendation for resolution of the dispute. Arbitration panel recommendations shall, in general, be reached by majority vote. However, where the parties agree to binding arbitration, or where required by the Regional Administrator, recommendations of such arbitration panels may be unanimous decisions. Where binding or non-binding arbitration panels cannot reach a unanimous recommendation after a reasonable period of time, the Regional Administrator may direct the panel to issue a non-binding decision by majority vote.

(iii) The arbitrator or arbitration panel members may consult with EPA's Office of General Counsel on legal issues, but otherwise shall have no *ex parte* communications pertaining to the dispute. Federal employees who are arbitrators or arbitration panel members shall be neutral and shall not be predisposed for or against the position of any disputing party based on any Federal Trust responsibilities which their employers may have with respect to the Tribe. In addition, arbitrators or arbitration panel members who are Federal employees shall

act independently from the normal hierarchy within their agency.

(iv) The parties are not obligated to abide by the arbitrator's or arbitration panel's recommendation unless they voluntarily entered into a binding agreement to do so.

(v) If a party to the dispute believes that the arbitrator or arbitration panel has recommended an action contrary to or inconsistent with the Clean Water Act, the party may appeal the arbitrator's recommendation to the Regional Administrator. The request for appeal must be in writing and must include a description of the statutory basis for altering the arbitrator's recommendation.

(vi) The procedure and schedule for arbitration of individual disputes shall be determined by the arbitrator or arbitration panel in consultation with parties.

(vii) If formal public hearings are held in connection with the actions taken under this paragraph, Agency requirements at 40 CFR 25.5 shall be followed.

(3) *Dispute Resolution Default Procedure.* Where one or more parties (as defined in paragraph (g) of this section) refuse to participate in either the mediation or arbitration dispute resolution processes, the Regional Administrator may appoint a single official or panel to review available information pertaining to the dispute and to issue a written recommendation for resolving the dispute. Review officials shall be EPA employees, employees from other Federal agencies, or other individuals with appropriate qualifications. Review panels shall include appropriate members to be selected by the

Regional Administrator in consultation with the participating parties. Recommendations of such review officials or panels shall, to the extent possible given the lack of participation by one or more parties, be reached in a manner identical to that for arbitration of disputes specified in paragraphs (f)(2)(i) through (f)(2)(vii) of this section.

(g) *Definitions.* For the purposes of this section:

(1) *Dispute Resolution Mechanism* means the EPA mechanism established pursuant to the requirements of Clean Water Act section 518(e) for resolving unreasonable consequences that arise as a result of differing water quality standards that may be set by States and Indian Tribes located on common bodies of water.

(2) *Parties* to a State-Tribal dispute include the State and the Tribe and may, at the discretion of the Regional Administrator, include an NPDES permittee, citizen, citizen group, or other affected entity.

* * *